

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 14, 2009 Session

**JIM DOWD, ET AL. v. JAMES A. CANAVAN, ET AL.**

**Appeal from the Chancery Court for Bledsoe County  
No. 2993     Jeffrey F. Stewart, Chancellor**

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**No. E2008-01432-COA-R3-CV - FILED JULY 30, 2009**

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This case was brought by potential purchasers of a farm, Jim Dowd and Peggy Dowd (“the Buyers”), against the potential sellers, James A. Canavan and Ann Canavan (“the Sellers”) to recover earnest money retained by the Sellers under a sales contract. After a bench trial, the court determined the Buyers are entitled to recover the earnest money deposit because they had been unable to secure financing, which was a contingency acknowledged in the contract. The Sellers appeal, arguing that the Buyers were able to arrange financing, and, alternatively, that they did not try hard enough. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSEL P. FRANKS, P.J., and JOHN W. McCLARTY, J., joined.

M. Keith Davis, Dunlap, Tennessee, for the appellants, James A. Canavan and Ann Canavan.

Elizabeth Greer Adams, Dunlap, Tennessee, for the appellees, Jim Dowd and Peggy Dowd.

**OPINION**

I.

A.

In October 2005, the Buyers lived and worked in Anchorage, Alaska, but wanted to move to Tennessee. Jim Dowd had lived in Alaska since 1965. Peggy Dowd married him and moved there in 1981. They made annual treks to visit her family in the area surrounding Signal Mountain. Their annual visits sparked a desire to move to the general area of Signal Mountain.

In October 2005, several factors appeared to converge for the Buyers. A favorable retirement plan became available from Mr. Dowd's employer, Alaska Airlines, that would have provided him a cash buyout, apparently in addition to normal benefits. The Buyers owned a home in Anchorage in a desirable neighborhood. Homeowners were routinely selling their homes in that neighborhood for asking price within days of posting a sign in their yard. The Buyers believed their home would easily sell for \$350,000 and leave them approximately \$200,000 equity. Mr. Dowd had been looking several years for an established Tennessee business to purchase and operate. In 2005, he ran across a wood shavings business owned by the Sellers; it was listed with a broker named Gene Bennett. The Buyers traveled to Tennessee to investigate the purchase of the business, and that led to a visit to the Sellers' farm. It was love at first sight. On December 12, 2005, the parties signed two agreements – one for the purchase and sale of the business and one for the farm.

The agreement covering the business was captioned "Asset Purchase Agreement." Its basic terms included a purchase price of \$215,000 and a cash deposit with the broker of \$21,000 to secure a closing on January 31, 2006. The Asset Purchase Agreement contained a financing contingency as follows:

Regarding 3a "Deposit": Deposit will be non refundable, except for the financing contingency (Par.9) and Due Diligence Clause in the attached Addendum. Deposit will be presented to Broker for Seller in the form of a personal check from the Buyer. Deposit to be presented by 12/20/05.

Paragraph 9, in turn, states: "If Buyer is obtaining new Bank or SBA financing . . . this offer is contingent on Buyer obtaining said financing."

The other agreement, the one covering the farm, was captioned "Real Estate Sales Agreement." The purchase price of the 200 acre farm, complete with home and barns, was \$561,000, with a closing date of May 30, 2006. The language that is key to this dispute is found in the agreement's paragraph 3:

Buyer shall submit a Deposit of \$54,000 (Fifty-four thousand dollars even). The Deposit will be non-refundable, except for financing (Par.9) and final home inspection and will be presented to Broker for Seller in the form of a Note and Deed of Trust on Buyer's home in Anchorage, Alaska. The Note and Deed of Trust are not to be recorded until the loan guarantee is secured by the Buyer. The note may be recorded at the Sellers discretion after the loan guarantee is secured, securing Seller as the lien holder. Deposit to be presented to Broker for Seller no later than 01/31/06.

There was no paragraph 9 in the Real Estate Sales Agreement. Approximately one month after signing the agreements, the parties executed an addendum in which they affirmed the business deal and modified the farm deal. Under the new terms, the Sellers retained a 50 acre parcel on which

their home and barns were located, and the purchase price was reduced to \$262,500. The Buyers were granted a right of first refusal to the remaining 50 acres.

The Buyers talked to several lenders but only applied to two, Farm Credit Services and First National Bank. Farm Credit declined to make the loan for the business. The decision maker testified at trial that he did not receive required documentation of income and expenses from the Sellers. Farm Credit would only lend 75% of the purchase price on the farm, leaving the Buyers responsible for a 25% down payment.

The Buyers secured a loan to close the purchase of the business from First National Bank, as well as a commitment to loan money toward the purchase of the farm. According to the bank's assistant vice-president, Jerry Johnson, First National was hesitant to make the business loan until Jim Canavan personally guaranteed the loan for the first year. The bank felt that the first year of operation was the riskiest. The bank provided a commitment letter dated February 7, 2006, for financing on the farm as follows:

To Whom It May Concern,

First National Bank has committed to loan James & Peggy Dowd up to 90% of the Appraised value or the sale price, whichever is less, for the purchase of 150 acres from James & Ann Canavan.

The sale of the business closed February 8, 2006. The Buyers borrowed \$62,100 on their home in Alaska through a second mortgage. They used \$21,000 to make the initial deposit on the business and applied approximately \$35,000 of the remaining \$41,100 toward the purchase price at closing.

Approximately one month later, the Buyers signed and caused to be recorded a deed of trust against their Alaska property in the amount of \$26,250, representing the deposit on the farm. Jim Dowd testified that they were not obligated at that point to record the deed of trust, but did it to show their good faith to the Sellers who were insisting on the recording. Jim Canavan did not admit to applying undue pressure on the Buyers, but conceded that they did want the deed of trust recorded as security.

The Buyers intended to obtain the down payment by selling their home in Alaska. According to the Buyers, they communicated to the Sellers and their broker from the beginning that freeing their equity through the sale of their Alaska home was the Buyers' only hope of raising the money to purchase the farm. The Buyers testified that the sale was delayed for several reasons, none of which were their fault. Remodeling efforts were ongoing until mid-2006 which weighed against listing the home with a realtor. Until the spring of 2006, the Buyers' neighbor was very interested in buying their home, but then the neighbor decided to leave Alaska. The Buyers immediately posted a sign, but got little interest because the roads in the subdivision were torn up. Also, according to the Buyers there was a downturn in the market. It was not until June 2006 that the Buyers listed the home with a realtor. The realtor was not able to sell the home for several months.

By the summer of 2006, the Buyers were in trouble financially. There were substantial unexpected expenses with the business that exceeded the income. Mr. Dowd was called back to Alaska by his employer with the threat that if he did not, he could lose his retirement buy-out. The Buyers were making three large monthly payments in the approximate amount of \$3,000 to cover the first and second mortgages on the Alaska property and the business loan. The Buyers testified that, while waiting for their home in Alaska to sell, they accrued about \$50,000 in credit card debt and were taking money for food from relatives.

Still, according to the Buyers, they tried to complete the farm transaction. They asked Mrs. Dowd's brother, Thomas Hall, and a long-time friend of the family named Elmer Northam for a loan to cover the down payment and/or the full purchase price. Both appeared at trial and confirmed that the Buyers asked them for a loan. Neither the brother nor the friend were in a position to help the Buyers.

On cross-examination, the Buyers admitted that, even after the second mortgage and the deed of trust to the Sellers, they had approximately \$100,000 equity in the home in Alaska. They were not asked by either their trial counsel or the Sellers' counsel whether they had inquired of their lender on either the first or second mortgage to advance the money for the down payment on the farm.

The Buyers testified that they were unable to complete the transaction by the closing date, so they met with the Sellers at their home in June 2006. According to the Buyers, the Sellers became angry upon learning that the Buyers had not listed their home in Alaska with a realtor until June 2006. Nevertheless, the parties executed an extension of the closing date to August 14, 2006. The Sellers admitted extending the closing date with full knowledge that the Buyers waited until June to list with a realtor. They also acknowledged knowing that the Buyers would need to sell their home to secure the down payment. During the extension period, the Buyers tried to "flip" the farm by selling to a third party hoping to break even or maybe realize a small profit. The Buyers were unable to find a new purchaser.

Upon realizing they were going to be unable to close, Jim Dowd requested of Mr. Johnson at First National a letter declining financing. Mr. Johnson complied with a letter dated August 22, 2006. The letter stated:

Regretfully, we must inform you that your request for a loan in the amount of \$262,500.00 to purchase 150 acres from James and Ann Caravan has been declined. The reason for the denial is that you do not meet the down payment requirements and your credit and income is not sufficient for this loan.

Upon receipt, the Buyers presented the letter to the Sellers with the request that they release the deed of trust. The Sellers refused. Mr. Johnson appeared at trial as a witness for the Buyers. According to Mr. Johnson, the commitment was contingent, "provided that their credit remained the same, that they didn't deteriorate or anything like that, and that they had sufficient income." It was also contingent on the Buyers furnishing the remaining 10% as a down payment. Mr. Johnson admitted

on cross-examination he was not aware that the Sellers had allegedly been willing to accept the deed of trust as the down payment.

On October 10, 2006, the Sellers sold the same farm property to another buyer for \$300,000. Mr. Canavan conceded that the commission payable out of the proceeds would have been much higher on the contract with the Buyers than with the actual sale. The Sellers claimed that they were harmed in various ways. They kept their property off the market from December 2005 to August 2006. They also purchased another parcel of property which it turned out they did not need or use.

The Buyers were finally able to sell the home in Alaska in February 2007. The selling price was \$329,900, minus commission and incidental costs. The Sellers received a check from the closing agent in the amount of \$26,250, in exchange for release of the deed of trust.

B.

The Buyers immediately filed this action to recover their earnest money. The Sellers counter-claimed alleging breach of contract. Eventually, the Sellers filed a motion for summary judgment, which the trial court denied.

The trial was started and finished on May 7, 2008, and the trial court announced its decision from the bench. The court first determined that “it’s very clear that this deposit was returnable upon failure to get financing.” The court next addressed “whether or not there was a reasonable effort to obtain financing.” The court, however, combined its discussion of the Buyers’ financing efforts with their efforts to sell the home in Alaska which it obviously saw as the vital, but missing, link:

And there is no question that that house [in Alaska] had to be sold in order for Mr. and Mrs. Dowd to come up with the money to complete the transaction. I think that testimony is clear from the efforts made throughout this process to extend the time for closing and the purpose for extending the time for closing was to give them additional time to sell their home.

Now, it’s true that in February they were given a letter from . . . Mr. Johnson there and he said that he would – the bank would finance it, 90 percent of the . . . sales price. . . . That would have required then, I think, \$26,250 which was the amount of the Deed of Trust, then, in this case.

\* \* \*

It didn’t sell by August the 13th. And as a result of that, the Canavans held them, then, in default and felt like that they were entitled to receive the earnest money because they thought the financing was there because of the letter that Mr. Johnson had written. It appears from listening to Mr. Johnson, it’s still that catch

22 that he had to have some proof that ten percent had been paid down on the selling price. There is only one place that ten percent could have come from and that's the sale of their home.

I think there is also a question of whether or not their financial situation changed; that is, the financial situation of the Dowds, and there was some reference in the letter declining to continue the loan with them . . . . [T]heir financial situation was not as good and they were making house payments, a first and second mortgage in Alaska, they were paying rent down here, they were paying a business debt. Mrs. Dowd left her job to come down here at some point in time. Mr. Dowd had to return up there.

\* \* \*

Therefore, I would find in favor of the plaintiffs in this case, that they would be entitled to receive their earnest money back from the defendants . . . .

Judgment was entered on the trial court's ruling May 30, 2008. This timely appeal followed.

## II.

The Sellers raise five issues<sup>1</sup>, which they state as follows:

Whether the trial court erred when it refused to grant the motion for summary judgment filed on behalf of the [S]ellers?

Whether the trial court erred when it determined that the [B]uyers were not able to obtain financing to purchase the [S]ellers' farm . . . ?

Whether the Dowds met their burden of establishing that they made a reasonable effort to obtain financing when the evidence was that they submitted loans [sic] to only two banks?

Whether the trial court erred when it concluded that the [B]uyers' earnest money deposit was refundable due to their inability to sell their home in Alaska despite the fact that the parties' contract was silent on this condition?

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<sup>1</sup>The Buyers identify no issues but attempt to interject a passing argument toward the end of their brief for attorney fees.

Whether the trial court erred when it determined that the [B]uyers' efforts to sell their home in Alaska were reasonable when they were aware of the need to sell their home for over ten months but did not list it for sale with a realtor until shortly before the expiration of the contract?

### III.

#### A.

This case was tried by the court without a jury. Thus, our review is *de novo* upon the record with a presumption of correctness as to the trial court's findings of fact. Tenn. R. App. P. 13(d). The judgment of the trial court will be affirmed, absent errors of law, unless the preponderance of the evidence is against those findings. **Bogan v. Bogan**, 60 S.W.3d 721, 727 (Tenn. 2001). We review the trial court's conclusions of law *de novo* with no presumption of correctness. **Ganzevoort v. Russell**, 949 S.W.2d 293, 296 (Tenn. 1997).

#### B.

The first argument we encounter is the Sellers assertion that, based on the bank's commitment letter, they were entitled to summary judgment. The Buyers, of course, counter, arguing issues of fact. We will not decide the issue because the matter actually went to trial and resulted in a judgment rendered on the proof taken at trial. "A trial court's denial of a motion for summary judgment, predicated upon the existence of a genuine issue of material fact, is not reviewable on appeal when a judgment is subsequently rendered after a trial on the merits." **Thuy-T-Lam v. Tuan Ngoc Bui Le**, No. E2008-02491-COA-R3-CV, 2009 WL 2047290 at \*3 (Tenn. Ct. App., E.S., filed July 15, 2009)(quoting **Bradford v. City of Clarksville**, 885 S.W.2d 78, 80 (Tenn. Ct. App. 1994)).

#### C.

The second issue is whether the Buyers were, in fact, able to secure financing. The Sellers begin by arguing that the reference to paragraph 9, which is missing in the Real Estate Purchase Agreement, is in fact a reference to paragraph 9 in the Asset Purchase Agreement. Paragraph 9 in Asset Purchase Agreement made the commitment to purchase the business contingent on the Buyers' ability to secure financing on the business. Therefore, argue the Sellers, the Buyers' became obligated to purchase the farm once they secured financing on the business. The Sellers cite us to no principles of law or interpretation to justify this strange result. They argue simply that Jim Dowd conceded the point under cross examination. In our review of the record, we have read Mr. Dowd's testimony from start to finish. We conclude that the Sellers are trying to spread the facts too thin. In fact, Mr. Dowd corrected counsel's suggestion that the reference to paragraph 9 in the farm contract was an incorporation of paragraph 9 in the business contract. "My understanding was that that referred to the money being refundable if we could not get financing."

The Sellers also argue that by preparing and recording the deed of trust, the Buyers admitted or confirmed that they had secured the necessary financing. We do not disagree that the Buyers actions could be so construed, but we do not agree that they must be so construed. Mr. Dowd was asked why he allowed the deed to be recorded and explained as follows:

I'd received some pressure to get this recorded for Mr. Canavan. And I was doing my best to be compliant and, in good faith, show that I was intending this to go through. And even though it was not – did not meet the requirements of having the financing, I knew I didn't have that, I just wanted Mr. Canavan to know that I am doing everything I can, just like I got the financing on the second mortgage to buy the business before we even signed the contracts. I was doing all I could to make this thing work.

Mr. Dowd further explained that Mr. Canavan was running his business at the time while Mr. Dowd was in Alaska, so he needed to keep a good working relationship. The trial court, whose duty it is to judge the credibility of the witnesses and the weight to be accorded to testimony, specifically commented on whether the recording of the deed of trust was an admission by the Buyers that they had secured financing:

The fact that they recorded the Deed of Trust is not controlling on whether they had obtained their financing . . . . Mr. Dowd said he did that to show his good faith in his belief that he would hope that the defendants would understand he was making reasonable efforts to get the property sold and conclude the sale, so I don't think that bears as proof against the plaintiffs in this case.

The evidence does not preponderate against the trial court's interpretation of the testimony.

Finally, the Sellers argue that the bank's commitment letter shows conclusively that the Buyers secured financing. Apparently the Sellers would have us ignore or discredit Mr. Johnson's testimony that the loan commitment was contingent on other factors including the Buyers supplying the other 10% in the form of a down payment. Again, the trial court heard and accepted that testimony. Our reading of the record does not preponderate against the trial court's finding that the Buyers had to come up with a 10% down payment, and that the bank withdrew its commitment when the Buyers could not even come up with 10% to put with the bank's 90%.

An interesting proposition, which neither the Buyers nor the Sellers address directly, but which both talk about in their papers, is that the Sellers were allegedly willing to accept the deposit and hold it until the sale of the home in Alaska in lieu of the 10% down. The proposition was often thrown out in cross-examination as a possibility. Buyers would not concede that the deed of trust was the equivalent of a 10% down payment. When all is said and done, we cannot tell that the Sellers ever communicated such a possibility before trial clearly to Mr. Dowd or the bank. If it had happened we expect it would have been proven by the Sellers, rather than expecting the Buyers to prove the negative. More importantly, we cannot tell that the bank would have been willing, much

less obligated, to go forward under that scenario. As explained by the sister lender, Farm Credit, an additional 10% owed is far different to a lender than a 10% cash down payment, in hand.

We have read the testimony of the witnesses. We do not find that the evidence preponderates against the trial court's finding that the Buyers were unable to finance the purchase of the farm.

D.

The Sellers next argue that the Buyers failed to make reasonable efforts to secure financing because they only applied to two potential lenders. The Buyers rely upon *Vonkrosigk v. Rankin*, No. M1999-02254-COA-R3-CV, 2000 WL 1483209 (Tenn. Ct. App., M.S., filed Oct. 10, 2000), to show that their proven efforts were above the threshold. In *Rankin*, Ms. Vonkrosigk sued to recover her \$5,000 deposit. *Id.* at \*1. She only made one loan application 25 days before the closing. *Id.* The application was denied because her recent loss of rental income had made her debt to income ratio too high. *Id.* at \*2. She was successful in the trial court and again on appeal. The only issue on appeal was whether she had made reasonable efforts to secure financing. *Id.*

The law applied in *Rankin* is the law we must apply here. Normally, a financing clause is a condition precedent that must be fulfilled before the potential buyer becomes obligated to purchase. *Rankin*, 2000 WL 1483209 at \*2 (citing *Strickland v. City of Lawrenceberg*, 611 S.W.2d 832, 837 (Tenn. Ct. App. 1980)). The hopeful buyer has “a duty to make a reasonable effort to obtain adequate financing.” *Id.* (citing *Covington v. Robinson*, 723 S.W.2d 643, 646 (Tenn. Ct. App. 1986)).

The question of reasonableness of a buyer's effort to obtain adequate financing is a factual question. *Educational Placement Services, Inc. v. Watts*, 789 S.W.2d 902, 904 (Tenn. Ct. App. 1989). In order for buyers to obtain a refund of earnest money when a financing contingency is not met, the buyers must establish that they acted in good faith in attempts to obtain the financing. See *Hudson v. Head*, No. 03A01-9503-CH-00103, 1995 WL 555638 (Tenn. Ct. App. Sept. 21, 1995).

*Id.* at 3.

It is clear from the trial court's comments and from our review of the record that this was not a case such as discussed in *Hudson v. Head*, relied on by the Sellers and cited in *Rankin*, where someone “decided he did not desire to go through with his purchase of the property.” *Hudson*, 1995 WL 555638 at \*3. In *Hudson*, the sale contract specifically obligated the potential buyers to “immediately apply for the necessary mortgage loan.” *Id.* at 1. Despite this clear obligation, the buyers in *Hudson* waited “over three months” and filed the one application “22 days before the closing date.” *Id.* at \*4. In *Hudson*, it was also clear from expert testimony that other financing options existed that were never explored. *Id.* When the *Hudson* sellers approached the potential buyers about the “problem,” the response was that it was not a problem for the buyers because the

financing contingency gave them a way out of the contract. *Id.* The present case is far different from *Hudson*.

The *Rankin* court affirmed the trial court upon observing that it's determination of the "weight, faith and credit" to be given to the evidence was entitled to great deference. 2000 WL 1483209 at \*3. The trial court had the opportunity to see and hear Ms. Vonkrosigk as she described her actions and efforts to obtain financing. *Id.* at \*3. The same considerations apply to the present case. The trial court specifically noted that all the witnesses appeared sincere, and sincerely tried to make this deal work. We agree, and hold that the evidence does not preponderate against the trial court's finding that the Buyers made reasonable efforts to secure financing.

#### E.

The Sellers next argue that the trial court erred in reading an unwritten contingency into the Real Estate Sales Agreement, namely, the requirement that they sell their home in Alaska. In a related final argument, the Sellers argue that the Buyers did not, despite the trial court's findings, make reasonable efforts to sell their home in Alaska. We will address these arguments together because we think the trial court addressed them together as part and parcel of its determination that the Buyers acted reasonably in trying to arrange financing.

The trial court's handling of the issue is consistent with *Hudson v. Head*, which we previously have discussed. The potential buyers in *Hudson*, husband and wife, knew full well that they would each need to sell their own homes to qualify for financing for the new home they were buying together. 1995 WL 555638 at \*4. Despite that knowledge, the husband waited until near the time of closing to put his home on the market, while the wife refused to even put her home up for sale. *Id.* The stubborn refusal to do what was obviously needed in *Hudson* was interpreted, not as a separate contingency, but as evidence that the potential buyers did not act reasonably to secure financing. *Id.*

As the trial court observed in the present case, the criticism of the Buyers is with the benefit of hindsight. In short, the Buyers' shortcomings, or mistakes, were explained to the satisfaction of the trial court. In light of the deference we must afford the trial courts first-hand experience with the case, we are not in a position to lightly disagree. We cannot say that the evidence preponderates against any findings the trial court made with regard to the Buyers' efforts to sell their home in Alaska.

#### IV.

As a final matter of "housekeeping," we note that the Buyers state, in a passing manner, that the subject contract provides for attorney fees, and, therefore, "they are entitled to an award of their attorney's fees." The Sellers' primary response in their reply brief is that the Buyers must lose, therefore, they cannot recover attorney fees. Obviously we have disagreed with the Sellers on that point. However, the Sellers also point out that the "issue was not brought before the trial judge." The best we can tell, the Sellers are correct. We have reviewed both the technical record and the transcript of proceedings and the only mention of attorney fees we can find is in the complaint. We

have not been directed to, nor have we found, an application for fees, an affidavit in support of fees, testimony of fees incurred, or order denying an application for attorney fees. An appellee who seeks relief on appeal must at least identify the issue and brief the issue, supplying us with some information as to where in the record the issue was addressed and the law that justifies the relief. *See* Tenn R. App. P. 27 (b) , (g), (h). The Buyers’ passing request does not even specify whether they believe the trial court committed some sort of error, or whether they want us to simply correct an oversight on appeal. The latter is not our function. *See* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”). Accordingly, we decline the invitation to award attorney fees to the Buyers, whatever it means.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants James A. Canavan and Ann Canavan. The case is remanded, pursuant to applicable law, for enforcement of the trial court’s judgment and for collection of costs assessed below.

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CHARLES D. SUSANO, JR., JUDGE